

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2021-000180-001 DT

10/20/2021

HONORABLE JOHN R. HANNAH JR

CLERK OF THE COURT
A. Walker
Deputy

PHOENIX NEWSPAPERS INC
KATHY TULUMELLO

DAVID JEREMY BODNEY

v.

ARIZONA STATE SENATE (001)
KAREN FANN (001)
WARREN PETERSEN (001)
SUSAN ACEVES (001)
CYBER NINJAS INC (001)

THOMAS J. BASILE
JOHN DOUGLAS WILENCHIK

KORY A LANGHOFER
COURT ADMIN-CIVIL-ARB DESK
COURT OF APPEALS
DOCKET-CIVIL-CCC
JUDGE HANNAH
REMAND DESK-LCA-CCC

RULING

Defendant Arizona State Senate has complied with the Court's order of October 11, 2021, directing the Senate to submit to the Court for *in camera* review certain documents as to which the Senate has objected on grounds of legislative privilege to plaintiff Phoenix Newspapers, Inc.'s public records disclosure request. Order at 10-13. The Court has read and considered Senate Defendants' Notice of Submission of Documents for *In Camera* Review and Request for Briefing Schedule, and reviewed the disputed documents.

As to Privilege Log p. 265 #6, a string of text messages exchanged between Senate President Fann and Phil Waldron between January 26, 2021 and July 15, 2021,

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THE COURT FINDS that the record contains no privileged communications for the following reasons.

- Topics: process of contracting with a provider for the audit, an unprivileged administrative matter; public relations issues relating to the audit, an unprivileged political matter; audit technical details, not integral to the deliberative process or reflective of policy-making decisions and therefore not privileged.
- Participants: Mr. Waldron not a legislator, legislative staff member or (at the time of this communication) paid consultant within privileged sphere.

As to Privilege Log p. 264 #4, ARZN_REV00100781, a draft contract between Cyber Ninjas, Inc. and EchoMail, Inc., containing mark-ups by Shiva Ayyadurai, chairman and CEO of EchoMail,

THE COURT FINDS that the record is not privileged for the following reasons:

- Nature of document: draft contract between Cyber Ninjas and EchoMail, Inc., an unprivileged administrative matter.
- Participants: Mr. Ayyadurai not a legislator, legislative staff member or (at the time of this communication) paid consultant within privileged sphere.

As to Privilege Log p. 264 #9, ARZN_REV00100781, probably a transcript of a telephone message left for Randy Pullen by Doug Logan and forwarded by Mr. Pullen to the audit's "official email account," dated June 12, 2021,

THE COURT FINDS that that the record contains no privileged communications for the following reasons:

- Topics: media relations relating to the audit, an unprivileged administrative matter; interface with Secretary of State and Maricopa County officials re: audit logistics, an unprivileged administrative matter.
- Participants: no legislators involved, so not integral to the deliberative process or reflective of policy-making decisions and therefore not privileged.

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As to Privilege Log p. 76 #3, ARZN_REV00071904, an email message from Senator Borelli to Representatives Biasiucci and Finchem dated May 12, 2021,

THE COURT FINDS that the record is not privileged for the following reasons:

- Nature of document: brief message forwarding May 12, 2021 letter from Senator Fann to Maricopa County Board of Supervisors Chair Sellers, not integral to the deliberative process or reflective of policy-making decisions and therefore not privileged.

As to Privilege Log p. 75, #5, ARZN_REV00078770, an email exchange between Senator Borelli and Representative Finchem dated February 23, 2021,

THE COURT FINDS that the record contains no privileged communications for the following reasons:

- Topic: brief message describing Maricopa County election audit results and forwarding link, not integral to the deliberative process or reflective of policy-making decisions and therefore not privileged.

As to Privilege Log p. 265, #14, a text string between President Fann and Representative Finchem from July 28, 2021 to August 3, 2021,

THE COURT FINDS that the record contains a privileged communication. The communication describes a separate communication between legislators that was an integral part of the deliberative process concerning a matter placed in the legislature's jurisdiction by Arizona law. This communication shall be redacted prior to disclosure of the remainder of the record.

THE COURT FURTHER FINDS that the communication contained in this record are otherwise not privileged, for the following reasons:

- Topic: public relations relating to the audit, an unprivileged political matter; public communications with Maricopa County concerning the audit, a non-privileged political matter; other unprivileged political matters not relating to audit.

The findings in this order do not include all facts relating to the listed documents that may bear on the Senate's assertion of legislative privilege or PNI's opposition. The Court has made only such findings as are necessary at this time for a ruling on each document.

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IT IS ORDERED setting a Status Conference on **October 28, 2021 at 8:30 a.m. (time allotted: 1 hour)**, to discuss the following:

- process for resolving undecided issues pertaining to legislative privilege generally (e.g. waiver, misconduct exception);
- revised privilege log and ongoing process of disclosing records as to which privilege claim has been withdrawn;
- possible need for *in camera* review of additional documents;
- schedule for disclosure of records found not privileged and/or motion to stay disclosure of records as to which privilege remains in dispute; and
- status of Senate's request to Cyber Ninjas for public records in custody of Cyber Ninjas or subcontractors.

Please note that the Court is utilizing a virtual platform called Court Connect. An auto-generated e-mail has been sent to local counsel of record. If for some reason you did not receive the e-mail, please advise the Court. You may join the hearing using the following link: <https://tinyurl.com/jbazmc-cvj07>, or you may appear via telephone by calling 1-917-781-4590, conference ID# 75956374#. For further information, please visit: <https://superiorcourt.maricopa.gov/court-connect/>

NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. Therefore, you will have to deliver to the Judge a conformed courtesy copy of any filings.